



No. 83-1764

IN THE

Supreme Court of the United States

October Term, 1983

L.D. BUTLER, Inc., a corporation,

Appellant,

vs.

PHILIP R. ASHLEY, individually and doing business as
PHIL ASHLEY TRUCKING,

Appellee.

On Appeal from the Court of
Appeal of the State of California.

**BRIEF IN OPPOSITION TO MOTION
TO DISMISS.**

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June 1, 1984

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I.

INTRODUCTION.

It is the contention of Appellant, L. D. BUTLER, INC., that Minimum Rate Tariff 8-A imposed by the California Public Utilities Commission violates the Sherman Anti-Trust Act. (15 U.S.C. § 1 *et seq.*) Appellee, PHILIP R. ASHLEY, contends that the State Action Immunity Doctrine, announced in *Parker v. Brown*, 317 U.S. 341, vitiates any such claimed violation and that the issue is moot.

II.

ARGUMENT.

A. The Question Is Substantial.

Appellee did not present any evidence on the existence of the elements necessary to satisfy the requisites of the State Action Immunity Doctrine. Here, those requisites would be: a. An explicit state policy to restrain com-

petition in the trucking industry, and b. active supervision of such a policy by the State of California. Instead, ASHLEY prevailed by way of a motion for summary judgment. Ashley failed to present any evidence on this point and failed to controvert the statements of BUTLER's president because to do either would have pointed out to the trial judge that there did exist a triable issue of fact, and summary judgment would have been denied. In effect, by admitting the anti-trust violation but claiming that the State Action Immunity Doctrine is applicable, ASHLEY has so far successfully avoided having to prove any supervision of this state policy, supervision that BUTLER claims has not existed for many years.

L. D. BUTLER, INC. never had the opportunity to demonstrate that ASHLEY could not satisfy the requisites of the State Action Immunity Doctrine. BUTLER contends that ASHLEY cannot, as a matter of law, make such a showing. The cancellation of MRT 8-A makes it clear that the State had no affirmative policy of anti-competitive pricing, and that there was no active supervision of the tariff regardless of its purpose.

BUTLER believes that if it had had the opportunity to present evidence regarding the actions of the Public Utilities Commission, the trial court would have found the same discrimination that compelled the Public Utilities Commission to cancel the tariff. BUTLER was denied this opportunity at every level. Appellant submits that Appellee has failed to establish immunity under the Sherman Act because it did not overcome the heavy presumption against immunity; because it failed to show affirmatively expressed and clearly articulated policies with reference to the tariffs in question; and because it failed to show the policy was actively supervised.

B. The Question Raised in This Appeal Is Not Moot.

Appellee misconstrues the gravamen of the appeal. Appellant does not ask this Court to strike down the tariff complained of. This task has already been accomplished. What Appellant does ask this Court to determine is whether the tariff which was applied to Appellant violated the Sherman Act. Neither party would be before this Court if the effect of the elimination of the tariff was to eliminate the judgment rendered as a result of the application of the tariff to Appellant.

Appellee cites *United States v. Alaska Steamship Company*, 253 U.S. 113 for the authority that this Court will not decide arguments after events have put them to rest. In that case, this Court noted: "(w)here by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." Here, the Appellant is still obligated to pay a judgment based on a tariff that it contends violates the Sherman Act. The controversy has not come to an end. The question raised in this appeal is not moot.

III.

CONCLUSION.

For the reasons stated both here and in Appellant's Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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L. D. Butler, Inc.